

No. 31125 - State of West Virginia ex rel. West Virginia Citizens Action Group, an incorporated association of State citizens and taxpayers v. West Virginia Economic Development Grant Committee; City of Wheeling, a municipal corporation; and Century Equities - Wheeling Victorian Outlet Mall, Inc., a private corporation

FILED

May 16, 2003

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Maynard, Justice, dissenting:

I must respectfully dissent to the majority opinion. I would uphold the constitutionality of the legislation at issue and allow the immediate sale of the bonds and construction of the projects approved by the grant committee.

Our law states:

In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.

Syllabus Point 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965). The majority errs by failing to resort to every reasonable construction to sustain

the constitutionality of the legislation in question and by failing to resolve any reasonable doubt in favor of it. I simply do not believe that those challenging the legislation have met the burden of showing that it is unconstitutional beyond a reasonable doubt.

According to W.Va. Code § 29-22-18a(d)(3) (2002), the nine-person grant committee comprises,

the governor, or his or her designee, the secretary of the department of tax and revenue, the executive director of the West Virginia development office, three persons appointed by the governor from a list of five names to be submitted to the governor by the president of the West Virginia senate, and three persons appointed by the governor from a list of five names to be submitted to the governor by the speaker of the West Virginia house of delegates.

A perfectly reasonable interpretation of this language is that it directs the Speaker of the House and the President of the Senate to suggest, advise, or nominate potential grant committee members, and that the ultimate appointment power resides in the Governor. By the express terms of the statute, the Governor, not the Speaker nor the Senate President, actually appoints the grant committee members. Further, I read the statute to indicate that the Governor is not obligated or bound to choose from the names submitted by the legislative leaders. For example, the Governor could request new lists from which to choose grant committee members.

Admittedly, the majority opinion is persuasive and well written. It is undeniable that the procedure for the appointment of grant committee members easily could have been drafted to better ensure the separation of legislative and executive powers as well as the Governor's unfettered use of his appointment power. However, whether the legislation at issue is less than perfect is not the question we should ask when determining its constitutionality. Instead, the question is whether this Court can give the statute any reasonable construction so as to uphold its constitutionality. Unfortunately, the majority opinion utilizes a hyper-technical analysis to reach a decision which simply is not legally inescapable. The majority could have reached the opposite conclusion just as easily while remaining true to sound constitutional principles. For the sake of the economic good of this State, I wish it had.

The majority's decision is based on a desire to protect the powers of the Governor granted by our Constitution. The members of this Court should be mindful, however, that we are not the only constitutional officers who took an oath to uphold the Constitution. The members of all three branches, including the Governor and the Legislators, also took such an oath. We are not the only guardians of the Constitution. Significantly, it was not the Governor who came before the courts challenging the legislation at issue. He apparently did not perceive any threat to his constitutional powers from the legislation. This is simply another reason why the Court should have been loath to find a statute unconstitutional when such a result was not absolutely mandated by our constitutional

jurisprudence.

Some may think I am being “result oriented” and believe I am dissenting to the majority opinion because of a strong desire to see these projects built and to see economic development in the State. While I freely admit to a strong desire to see economic development, a desire I believe the majority shares just as strongly, that is simply not my reason for disagreeing with the majority. Rather, I am completely convinced that my conclusion that the legislation at issue is absolutely and fully constitutional is both in accord with this Court’s prior constitutional decisions and based on sound judicial principles of statutory construction. While the legislation may not be a model of clarity, and in fact, it may not even be well written, and the mechanism it creates to fill these committee posts is unwise and unfortunate, it is not unconstitutional.

The majority obviously believes that the legislation’s perceived constitutional defects can be easily and rapidly corrected. I fervently hope that this is so, and the economic projects can then proceed without undue delay. That would be a wonderful result! But no one really knows how long it will take for the Legislature to address these issues. After that, there is likely to be a new court challenge to the corrected legislation which could take months to wind its way through all the circuit court pleadings, hearings, motions, etc. This would be followed by another appeal to this Court, and the process would start all over again with preparation of the record below, then briefs and arguments here, all resulting in some

further delay. I think it possibly could take many months and maybe a year or more to resolve.

Bond markets are notoriously jittery and nervous trading exchanges, and bond sellers and buyers are extremely cautious folks. I fear these bonds could not be sold during the period when litigation is still ongoing.

Clearly, the majority opinion will cause some delay which may or may not be significant. The plain fact is that the towns, cities, and counties that received economic grants for their respective projects need them desperately and need them now! Most of these projects concern improvements to infrastructure which will be of great help in creating real jobs for working people. Therefore, I hate to see these projects unnecessarily delayed even one more day.

For the reasons stated above, I would have found W.Va. Code § 29-22-18a(d)(3) to be constitutional. Accordingly, I respectfully dissent to the majority opinion.